DUE PROCESS OF LAW — TO-DAY*

I

WHILE trying to avoid didactic excerpts from the historical library that has grown around the phrase "due process of law," I ask leave for some reference to history, as prefacing and perhaps explaining contemporary thought. My excuse for this address is a belief that the ancient words do not (various courts to the contrary notwithstanding) speak to us with the same voice, or connote the same mental assumptions, or suggest the same backgrounds, political and social, as they did two generations ago, or even when my generation at the bar took the professional oath.

For present purposes it makes no difference whether Coke was right or wrong in identifying due process with the law of the land, and thereby giving to a phrase twice inserted in our national Constitution, and in substance appearing in that of every state, an ancestry emerging into script in Magna Charta. That King John's agreement not to "go against" (whatever that meant) any freeman, except by the judgment of his peers, *or* (not *and*) *per legem terrae*, in due time begot our constitutional guarantees, may not be true, but it is accepted legal history, and lies at the bottom of all our classic legal writing.

May I remind you that the phrase is of convenient vagueness; forty years ago our highest court said that it could not be defined, or at all events definition was declined, because it was better to ascertain meaning in each case by a process of judicial inclusion and exclusion.[1] This reservation of mental liberty for succeeding courts has often since been insisted on,[2] and exercised.

It is putting the same thought in another way to say that the historical test is not final, for to hold that what was once due process must always remain so "would stamp upon our jurisprudence

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[1] Davidson *v.* New Orleans, 96 U. S. 97, 104 (1877).

[2] Holden *v.* Hardy, 169 U. S. 366, 389 (1898); Orient Co. *v.* Daggs, 172 U. S. 557, 563 (1869).

the unchangeableness attributed to the laws of the Medes and Persians." [3]

If definition is either impossible or impolitic, and history is a guide uncertain at the best, how is decision to be reached? And is it not obvious that when a promise of judicial inclusion or exclusion was held out, hope was encouraged that the especial sorrow of each particular litigant might be wiped away by the saving phrase? Complaints over the flood of litigation following the Fourteenth Amendment have a humorous side. We have encouraged what we criticize.

Nearly all suits at law, constitutional litigation included, arise in the same way: the plaintiff firmly believes that he is enduring oppression, due to active fraud or callous denial of right, and therefore he brings his suit to ascertain, as he might ironically put it, whether what he knows to be wrong is nevertheless according to law.

As no lawyer admits identifying even the law as it ought to be, with his client's ideas of natural or poetic justice, it is as well *in limine* to consider what is the law whose due process is so important. I attempt no definition of that word, observing that Moses, Blackstone, and Mr. James Coolidge Carter have not permanently succeeded; but for present purposes law is anything effectual in depriving any person of life, liberty, or property, provided it emanates directly or indirectly from a national governmental agency, or from a state. Both the Fifth and Fourteenth Amendments deal in negations only, — the nation agrees not to deprive without due process, and not to let a state do so; but it does not promise, nor is it authorized directly, to legislate against deprivation by other citizens,[4] and a state may be as unjust as possible in legislation or administration, and yet such oppression is law — of sorts.[5] Further, the "due process" imposed is not primarily a requirement that right be done, but that appropriate machinery for doing right be provided.

It is therefore almost impossible to imagine an action brought affirmatively to prove that due process has been provided; the prayer is always to declare that something definitely stated is

[3] Hurtado *v.* California, 110 U. S. 516 (1884).

[4] The Civil Rights Cases, 109 U. S. 3, 13 (1883).

[5] Memphis Gas Co. *v.* Shelby County, 109 U. S. 398 (1883).

not due process; and the actual course of suit is to show what has been done, garnish the concrete facts if possible with opinion evidence, and leave the court to include or exclude as to it seems, — what? Expedient, politic, necessary, advisable, or desirable, — say the critics, — but whatever carping observers say, the court always says, *lawful.* Any study of actualities in this domain of constitutional applications presents this final query: — What are the preferred tests, what the evidential material most persuasive, — in producing a ruling that any given governmental act is or is not something that can be discovered, but cannot be defined. A process suggesting the analysis of organic bodies, of which the flavor or odor is often the leading characteristic; — with the vital element breathing defiance to the analyst.

The reasons urging our fathers in citizenship to put the words where they are, and the schools of interpretation generated by them, may be mentioned before attempting this legal chemistry.

The Fifth Amendment, like all those agreed on as the price of constitutional adoption, was based on an instinctive provincial fear that the new nation would minimize the states. I believe this is admitted by all students. The Fourteenth was a straight party measure, due to distrust of the states solely in respect of their possible treatment of the negro. The sufficient proof of party spirit is that in all the legislatures of all the states exactly one Democrat voted for it, — and that man's name should be rescued from oblivion.[6] He was Assemblyman Bernard Cregan of New York, — commonly known as "Tom Thumb" from his diminutive size. The Fifth Amendment was not opposed because most thinking persons deemed it harmless *per se,* and a sop to a parochial populace; and the Fourteenth was adopted, because the northern majority hoped thereby to secure for the negro that sort of political and personal liberty to which they were themselves accustomed and thought every human entitled, — not doubting African fitness therefor because he, by hypothesis, was human also. This is a small foundation for the superstructure of doctrine raised around the words "*liberty and property,*" — life has borne but small part in the discussion. Every reported consideration of the constitutional phrase bears internal evidence that the writer

[6] FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT.

inclines to one of two views, — either he regards the words as importing and imposing a rule so venerable, universal and potent, that governmental results not logically developed by that rule from precedent authority, usually *judicial*, are indefensible; or he views them only as cautionary, prescriptive of a procedural pattern, usually *legislative*, but leaving to the lawmaker varieties in fashion exuberant as those of a woman's headgear.

The conservative and radical schools of thought exist at the bar as they must in respect of all ratiocination; but as soon as our profession became the interpreters, all American constitutional reasoning became and remains strongly tinged with the rigorous verbal logic of the lawyer who (to be happy) must connect with a precedent or two any and every result he reaches, and call the same law.

The nature of due process, as derived from history before 1789, or meditation on the nature of things, is a subject soon exhausted; and for the two generations I am considering we have reasoned on this matter in a way I think peculiarly American. We know that our Federal Constitution is one of delegated powers, and (however erroneously) incline to treat those of the states in the same way; and when a plaintiff asserts that something is not due process, he succeeds (if he does) not *ex rerum naturâ* but because that something is not contained within some other express or implied power of the law-making authority. This way of treating the constitutional question is accepted by even conservative writers, of whom Mr. William D. Guthrie [7] is perhaps the most distinguished living example.

Our present Chief Justice expressed the same thought when he said that the Fifth Amendment "qualified so far as applicable" all other constitutional provisions.[8] In result the lawyer-like way of defending a challenged act is to establish its propriety under some other constitutional provision so plainly that it defies the due-process clause.

Though the phrase pervades our every scheme of government, slight study of actual cases shows that the overwhelming majority of complaints arise in the attempted exercise of the powers of

[7] THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION — LECTURES BEFORE DWIGHT ALUMNI ASSOCIATION, 1898.

[8] McCray *v.* United States, 195 U. S. 27, 61 (1904).

police, taxation, procedural regulation, and eminent domain, and in the order named, while as incident to the police power, or included within it, regulation of activities affected with a public use looms large, and classification for benefits or burdens is so large a part of or preparation for taxation or regulation, that at times one doubts the mathematical axiom that the whole is greater than any of its parts. Thus the modern study of due process almost becomes an examination of legislative activities *de rebus omnibus, — et quibusdam aliis.*

Why without any change of language, and no variation in procedure making our lawyer grandfathers, utter strangers in our courts, — litigation over the clause is a growth of almost exactly two generations as usually counted, — is a fascinating study. To me the reasons seem to have no very close relation to the law or its professors; but to rest on the social and material changes which have within the years indicated transformed this country from an agricultural to a manufacturing community, and its population so largely from rural to urban.

One short extract from one book illustrates where the bar in general stood as to the scope and meaning of due process of law, more than fifty years after independence. The first edition of Story on the Constitution appeared in 1833, and the sole reference to the Fifth Amendment is this: "This clause in effect affirms the right of trial according to the process and proceedings of the common law." Simple and summary, is it not? Story's was an encyclopædic mind, but with no tinge of prophecy; that sentence discloses the professional view that read the words only as affecting courts, administering interpersonal relations, — perhaps with special reference to the criminal side.

A dozen years later, it could be said in South Carolina, that "the law of the land" meant "the common law and statute law existing in this state at the adoption of our constitution." [9] About equally simple, I think; but the idea of a body of law, fixed as to kind at least by constitutional congealment, is perhaps discernible.

A few more years passed, and in 1855 the Supreme Court in *Murray* v. *Hoboken Land Co.*[10] considered the legality of the

[9] State *v.* Simmons, 2 Spears (S. C.), 761, 767 (1844).

[10] 18 How. (U. S.) 272, 276 (1855).

treasury warrants issued against Andrew Jackson's defaulting collector, under which much of the mosquito-bitten land on which to-day stand hundreds of factories near the Bergen Hills, had been sold. Story's successors thought they covered the subject by saying that

"though due process of law generally implies and includes *actor reus judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings,"

yet history showed some equally settled exceptions and treasury warrants were among them; — the title to the Hackensack Meadows was quieted.[11]

That all men of that day had no conception of due process, other than a summary description of a fairly tried action at law, is not asserted; but I do submit that reports before the Civil War yield small evidence that there was any professional conviction that it was more than that. The judicial parsimony of the best courts is proverbial, but it is plain that when the Supreme Court thus spoke in 1855 they felt that public necessity had been satisfied; and procedure only was in mind.

The idea, however, that what one generation calls vested rights, and the next one vested wrongs, was something for which "due process of law" afforded a shield, was planted; the evidence is found in the state reports. Contemporary with the Hoboken case was that of Wynehamer,[12] where Judge Comstock (*nomen clarum*) said in substance that the law of the land could not be a statute taking away property rights already existing. The judge was not the discoverer of the iniquity of confiscation, but his remark was typical of the thought then new to the reports, that existing property rights were things needing protection from legislation, — and the bar, while casting about for ways and means, was pondering over due process.

Life is legally a simple word, and property fairly easy, — but *liberty* was sure to grow in a country like ours, and before adoption

[11] *Cf.* Commonwealth *v.* Byrne, 20 Grat. (Va.) 165 (1871).

[12] 13 N. Y. 378, 393 (1856). *E. g.*, "Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land" and "due process of law" within the meaning of the constitution, then the legislature is omnipotent."

of the Fourteenth Amendment bench and bar had given the word meanings such as the right to use one's faculties in all lawful ways, to live and work where one wishes, to pursue any lawful calling, trade or profession, and acquire and retain the gains therefrom.

Very early in Fourteenth Amendment discussion the Supreme Court remarked [13] that the provision

"furnishes an *additional* guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society."

The words seemed to accept a meaning for *liberty* (worked out in New York quite as thoroughly as elsewhere), for which no historical warrant as of the year 1789 can be found,[14] but concerning which it is now as idle to cavil or complain as over Coke's historical accuracy or lack of it, in respect of Magna Charta.

To sum the assertions thus far ventured: — the generation that fought the Civil War usually identified due process with common-law procedure; they knew vested rights in property, had a generous definition of liberty in many new and quite American aspects, never doubted the fullest liberty to contract, and since the national government then scarcely touched the private citizen in days of peace, had given the Fifth Amendment very scant consideration.

It was that generation which, politically intent on the negro, and with nothing else in mind, worked out the Fourteenth Amendment, — which was over five years old before the Slaughter House cases [15] opened, before a very able court, the still continuing conflict between private desire and public authority.

II

Case law resembles a patch-work quilt; it is strong and serviceable, but to see the pattern you must have distance, while the makers always look at the last patch when putting on a new one; so the latest decision seems most important, and the Slaughter House cases have become something practitioners cite but do not read. This excuses statement of the facts that made a curtain raiser

[13] United States *v.* Cruikshank, 92 U. S. 542 (1875).

[14] 4 HARV. L. REV. 365.

[15] 16 Wall. (U. S.) 36, 76 (1872).

for Fourteenth Amendment litigation. Louisiana interfered with the vested rights of New Orleans butchers by restricting slaughtering to one area controlled by one company and subject to sanitary regulation, but everyone could there kill cattle on payment of fees. From a lay standpoint, the facts prove my thesis, — could anything be more reasonable in a sub-tropical town, and would anyone now dream of complaining?

As a lawyer, however, it seems to me noteworthy that the strict and loose, conservative and liberal schools of interpretation not only instantly appeared at bar, but in the court, and along party lines, in a way not usually recognized. The justices were counted Republican, except Field, but both he and Bradley had Democratic minds in governmental matters; they distrusted government, the less of it the better; as successful lawyers they loved the rigor of the game, and hated anything that could not justify existence according to inherited rules. Miller, J., for the court, laid down two propositions here relevant: (1) The police power is something incapable of definition, necessary to sovereignty, not to be bargained away, and subject to which every man holds property. This was acknowledged borrowing from Shaw, C. J.,[16] and added nothing to Taney's epigram that it was no more than the power inherent in a sovereign, *i. e.*, sovereignty;[17] and (2) the Fourteenth Amendment could not be invoked as to privileges and immunities due one as a state citizen, invasion of the rights of a citizen of the United States must appear, but exactly what such rights were could not be stated comprehensively or in advance; to hold otherwise would belittle and degrade the states, a thing unthinkable. The dissent of Field and Bradley declared the nation charged by the amendment with the power and duty of protecting whatever privileges and immunities belonged of right to the citizens of *any* free government, a doctrine logically compelling the Supreme Court of the nation first, to draft a code of freemen's rights, and then enforce it *uniformly* in all the states.

I believe that the view of human rights glorified in common-law courts, — the Democratic view, inclined its holders to a bold constitutional doctrine, and Mr. Guthrie, also politically Democratic,

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[16] Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, 84 (1851).

[17] License Cases, 5 How. (U. S.) 504, 583 (1847).

holds that the Slaughter House decision "dwarfed and dulled the *protective* power of the amendment," and so it did. The paradox is that men of the school who always inclined against national authority while state power was rarely exercised, magnified the greater sovereign when the states seemed to rouse from the rôle of King Log. That Miller, J., conceived himself as guarding the gate against an invasion of social questions, vexatiously beyond the concept of historic common law, is a fair speculation, for the court of that date is not usually regarded as very tender of "state's rights." But that phrase has a perverted meaning, being popularly identified with Calhounism and nullification, and in a very true sense the court of the Slaughter House cases cherished state's rights in what they considered non-political matters; vision was still concentrated on the political negro question.

Ten years passed, and my legal generation came to the bar (108 U. S. and 91 N. Y. were our first reports in 1883); down to that date appeals to due process were rare, and (barring the negro cases) never successful except on the procedural side. There *Pennoyer* v. *Neff*[18] is a true monument, laying down, in strict accordance with tradition, the requirement of a good judgment *in personam*, and for Field to write the opinion was doubtless a labor of love. When this generation of mine opened the reports, the chill of the Slaughter House decision was on the bar, with the added discouragement of the Granger cases,[19] whose language, and *we* thought decision, seemed to put all complaints of corporate regulation of service and charges out of court, if an appeal under the due-process clause was ventured against a state; the still continuing dissents of Judge Field seemed most unorthodox. The remark in another judgment, that due process was usually what the state ordained,[20] seemed to clinch the matter.

But the changes, before alluded to as wholly unrelated to our professional activities, but big with legal importance, were daily becoming more apparent. The youngsters of to-day of course regard the early '80's of the last century as sadly reactionary and stagnating in conservatism, but we thought ourselves progressive reformers, as does every age and generation of recorded history

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[18] 95 U. S. 714 (1877).

[19] 94 U. S. 113 (1876) *et seq.*

[20] Walker *v.* Sauvinet, 92 U. S. 90 (1875).

War memories were fading fast, greater cities needed more government than farming townships, increasing wealth tempted taxation, ambitious local improvements demanded it, and heavily indebted transportation lines controlled by distant security holders continued to irritate an increasing population that owed its existence to that which excited their anger. Everywhere was there quick material recovery from the collapse of '73, and everywhere increasing inclination to translate social yearnings into statutes that interfered with that also fast-increasing class who wished to be let alone because they were very well able to take care of themselves under a static common law; dynamic statute law was unknown and abhorrent.

The material was fast preparing, and the state courts were producing results as variegated as their political surroundings; but only a few preceptors taught their pupils that such increasing divergence in local results would surely lead to renewed and determined efforts to produce sameness if not harmony through the due-process clause in the Amendment still thought of as new.

It may be a personal whim, but I think that year, 1883, marks an epoch, for it considered *Hurtado* v. *California*.[21] When that enterprising state so far abolished grand juries as to prosecute serious felonies by information, it was held due process, with the remarks about Medes and Persians quoted earlier in this address, and the historical school had a quietus. If even in procedural matters our inherited law knew nothing of a state's new method, such method might be wrong, but it was necessary to show therefor some reason other than ancient history. But that was only procedure, a form, and all laymen and most lawyers contemporaneously overlooked the substance that was in it; theories of taxation were as yet simple, whatever their financial weight; the exercise of police power directly upon the citizen was still rare, and in the older states, as late as 1885, such a holding in favor of liberty of occupation and vested rights as that in the tenement-house cigar case[22] excited small comment; it was the ignorant and arbitrary action of local railway commissions that incited what from our present distance seems a strategic drive against the do-nothing policy of the Granger decisions.

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[21] 110 U. S. 516 (1884).

[22] *Re* Jacobs, 98 N. Y. 98 (1885).

There were some intermediate rumblings, like the intimation that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation;" [23] but it was not until 1889 that any regulatory act or system of a state affecting transportation lines was nullified under the due-process clause, or otherwise, for that matter.[24]

The court was changing, the tide of litigation rising fast in response to business demands. Miller and Bradley (soon to be united in death) still disagreed; the former (the better political seer) consenting to coerce the state, only on the far-seeing ground that it was meddling with interstate commerce; the latter (the better trained lawyer) clinging in dissent to the Granger cases, which he declared to be overruled in principle, — a *dictum* generally approved, notwithstanding the continued use of them by the Supreme Court, — when convenient.

It is from that decision that I date the flood. Justice Bradley was as usual right in intuition; the thought underlying the Granger doctrine was that the law-making power was not only solely empowered to establish law, but to declare the reasonableness thereof; the departure made in 1889, and settled soon after Bradley's death in the Texas Commission cases,[25] practically arraigned legislators at the bar, and passed judgment *not*, mark you, on the justice or wisdom, but the *reason*, of what they had done, and "reason" is another of those words as to which inclusion and exclusion are more appropriate than definition. It may be added that most men with difficulty discover reason in that which they firmly believe unjust, unwise and probably dishonest. This, however, was no revolution, except within the court, whose changing personnel soon contained in Justice Brewer a powerful reinforcement to the school of Field, — his near kinsman. For the world at large, all that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older states, and the legislatures had not only domestic censors, but another far away in Washington, to pass on their handiwork.

No state had more influence than New York, and the Wynehamer case is especially noteworthy. When vested rights in liquor

[23] 116 U. S. 307, 331 (1886).

[24] Chicago, etc. Ry. *v.* Minnesota, 134 U. S. 418 (1890).

[25] 154 U. S. 362 (1894).

appealed against drastic legislation, Comstock, J., said that "we must be allowed to know that intoxicating liquors are produced for sale and consumption as a beverage." Surely not a very great assumption, but so taking judicial cognizance of social and business conditions, putting the court's own construction on that of which cognizance is taken, and then judging the legislative act by the result thereof, is practically making a category of reasons, judicially recognized, and then inquiring whether any of *those* reasons support the statute. That the legislators knew none of them, or rejected them, is immaterial.

Does it not seem clear that if the reasonableness of a body of railway rates could be tested by suit, the same inquiry must be open as to every serious regulation of any business, trade, or profession of a gainful nature? So it has been; and for something less than thirty years we have had every species of state action productive of pecuniary loss to vested rights, or limiting business liberty, put to the acid test of due process in the Supreme Court.

The result to-day of an enormous expenditure of argument and output of opinions may be measured in respect of either the nature of judgments given, or methods of reaching judgment. The mandate filed is usually of agreement with the legislature; in the ten years from 1890 there were one hundred and ninety-seven appeals over due process, but only six times in that century were such important matters as transportation rates successfully attacked; and speaking generally state courts having a reputation for independence and vigor are always sustained. Taking Massachusetts, New Jersey, and New York together, I can recall only one case in which the highest state tribunal has been reversed on the process clause. Considering (rather loosely) the legal topics usually suggestive of complaints of undue process, — as to procedure we stand on *Pennoyer* v. *Neff*, — applied sometimes in a way that must still disturb Justice Field. Taxation is always due in process if it is a real tax on property or rights within the jurisdiction, confirmed after hearing. Police power once freed from the shackles of the historic test has overshadowed every other head of litigation, and even eminent domain has advanced; for anything as yet discovered and deemed good for the public by the legislature is sufficiently eminent to have domain, and thus *ex vi termini* become due process. This form of statement may interest us as

citizens; as lawyers it is a duty to map out the path by which such uniformity in result is reached.

Justice Holmes, the Voltaire of our bench, once frankly said in an opinion that the Supreme Court never decided anything that could be avoided. The wisdom of the practice, and some errancy of statement is well illustrated by the case of Dred Scott and its aftermath; but when it comes to due process nowadays it is strictly true. The plaintiff must show damage, suits by *amici populi* need not be decided;[26] the damage must be in the present tense, an expectation of future loss is not enough;[27] loss in only one department of an integral business has been used to prevent consideration, for the whole business may be reasonably profitable;[28] any possible statutory construction, however surprising to the plaintiff and unheard-of in daily life, is enough to prevent unconstitutionality;[29] a failure to ask for a rehearing,[30] or actual appearance when a defective statute provided for none,[31] may put an otherwise meritorious plaintiff out of court; and if hearing had it is enough if it be held after tax already laid;[32] and a failure to go to the highest state court before troubling the Supreme Court may delay if not defeat relief.[33]

These few and recent illustrations might be much extended, and some comparison with other heads of jurisdiction induce belief that more pitfalls have been prepared for him who complains of undue process than for any other litigant, in what is usually a court of generous practice.

If decision cannot be avoided, presumptions are next considered, — such as the *prima facie* constitutionality of any act; that what is enacted expresses the public policy of the state, or that what is complained of is matter of discretion, — which is not reached by the clause.[34] A hardy remnant, however, demands answer to the

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[26] Cusack *v.* Chicago, 242 U. S. 526 (1917).

[27] Knoxville *v.* Water Co., 212 U. S. 1 (1909); Willcox *v.* Consolidated Gas Co., 212 U. S. 19 (1909).

[28] C. & O. Ry. Co. *v.* Commission, 242 U. S. 603, 604 (1917).

[29] Pennsylvania, etc. Co. *v.* Gold, etc. Co., 243 U. S. 93 (1917).

[30] Vandalia R. R. Co. *v.* Commission, 242 U. S. 255 (1916).

[31] Kryger *v.* Wilson, 242 U. S. 171 (1916).

[32] Embree *v.* Kansas District, 240 U. S. 242 (1916).

[33] Prentis *v.* Atlantic Coast Line, 211 U. S. 210 (1908).

[34] St. Louis and Kansas City Land Co. *v.* Kansas City, 241 U. S. 419 (1916).

real question, — has the legislature made the mere existence of rights secured by the Constitution the occasion of depriving their owner of them, — even under the *forms* that belong to due process of law? This was the inquiry as phrased in the Wynehamer case; it asks why, for what reason did the legislature do this thing? And when in answering, the courts take cognizance even of what *they* believe to be known *semper, ubique et ab omnibus* the result is often a verdict, a finding of fact and not of law, except as it is the law of that case.

This is the kernel (if there be one) of my thoughts, for I now leave procedure as intellectually still founded on *Pennoyer* v. *Neff*,[35] also eminent domain and taxation, as depending only on the query, is there a real taking or tax of something infra-jurisdictional, in a method procedurally due? There remains police power, *i. e.*, the concrete expression of sovereignty, — what is its modern relation to due process, under either amendment, or any state constitution?

The venerable ex-President of this University is the author of two bulky volumes concerning religious and scientific conflict, — they should be called White's History of Dissent. I wish a lawyer would measure the development of law by dissents, — which are worth more study than is usually accorded them. In a court not subject to sudden change, able and continued dissent delimits and accentuates decision; it reveals far more than does the majority opinion the intellectual differences of the council table; and the present status of police power is to me more clearly revealed by the dissents of Justice Holmes than by the syllabi of digests.

Sixteen years ago he entered a court already committed to that review of state action, which necessarily followed a successful appeal against local railway regulation; but as yet not much troubled with intimate statutory repressions or encouragements along a line now extending and recently extended from the peaks of wages and hours of labor,[36] through a jungle of blue sky,[37] employment agency,[38]

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[35] *Cf.* Saunders *v.* Shaw, 244 U. S. 317 (1917), for a very modern application.

[36] Wilson *v.* New, 243 U. S. 332 (1917).

[37] Hall *v.* Geiger-Jones Co., 242 U. S. 539 (1917).

[38] Brazee *v.* Michigan, 241 U. S. 340 (1916); Adams *v.* Tanner, 244 U. S. 590 (1917).

and compensation statutes,[39] to the intellectual mud holes of ice cream [40] and trading stamp ordinances.[41]

The idea that due process was something like a writ, and if no writ could be found, the law afforded no remedy was duly exploded; it does not press the simile too far to say that since the Hurtado case, the legislatures of my generation could proceed as *in consimili casu;* but no court had given any more exuberantly American definitions of liberty than already existed in the Supreme Court reports,[42] even though in a rather hazy way it was admitted that liberty of contract was subject to police power limitations;[43] and one pregnant sentence, to the effect that no man could have a vested right in any rule of the common law,[44] *i. e.*, in the customs of our forefathers, had plainly survived the Granger wreck.

No man has seen more plainly that the court was measuring the legislature's reasons by its own intellectual yardstick than has Justice Holmes; none more keenly perceived that the notations thereupon marked those results of environment and education which many men seem to regard as the will of God or the decrees of fate. He has complained that a "constitution is not intended to embody a particular economic theory," though of course a statute may be and often is designed so to do; and in particular the "Fourteenth Amendment does not enact Mr. Herbert Spencer's social statics," and he deems the "word liberty perverted when held to prevent the natural outcome of a dominant opinion;"[45] while as for "principles," it is sometimes idle to speculate whether they are "eternal or a no longer useful survival, (for) constitutionality is independent of our (*i. e.*, the courts') views on such points." [46]

To arrive at what the Justice so simply calls the "osmose of mutual understanding,"[47] one asks, is anything left *not* independent of constitutionality? The seeming answer is that a statute

[39] Hawkins *v.* Bleakly, 243 U. S. 210 (1917).
[40] Hutchinson *v.* Iowa, 242 U. S. 153 (1916).
[41] Rast *v.* Van Deman, 240 U. S. 342 (1916).
[42] *E. g.* Allgeyer *v.* Louisiana, 165 U. S. 578, 589 (1896).
[43] Holden *v.* Hardy, 169 U. S. 366 (1898).
[44] Munn *v.* Illinois, 94 U. S. 113 (1876).
[45] Lochner *v.* New York, 198 U. S. 45, 75 (1905).
[46] Grant Co. *v.* Gray, 236 U. S. 133 (1915).
[47] Brown *v.* Elliott, 225 U. S. 392, 404 (1911).

which a "rational and fair man would admit to infringe fundamental principles" [48] is unconstitutional. But what principles are fundamental? Except as illustrated by the Frank-Georgia mob case [49] and his delightful treatment of the statutory sandbag devised by Louisiana for the American Sugar Company [50] we remain uninstructed; but I humbly conclude that if there are any principles so fundamental as properly to invalidate formally correct legislative action, the differences between the present extremes of judicial opinion on this subject are of degree and not kind; for all agree that however correct in procedure, the *ipse dixit* of the legislature is not a sufficient reason for what it decrees, therefore a reason must be shown sufficient for the reviewing court, and the court's approval or disapproval is an opinion, which, as Justice Holmes says, "*tends* to become law."

This is our condition to-day. It is hard for me to call this law in the same sense as we speak of patent law or that of insurance; but it is a far higher exercise of juridical thought, — to justify from term to term all exercises of popular will which do not plainly violate some express or plainly implied constitutional prohibition. It is really a function of political criticism.

Irrespective of party, and I respectfully believe with small regard most of the time for legalism, while maintaining legal form, — the highest court and most high courts have refused to regard constitutions as codes, and of late years have more and more made due process of law whatever process seems due to the demands of the times, as understood by the judges of the time being.

The direct appeal of property to due process has for the most part failed; and apparent successes have but taught legislators how to arrive at the same result in another way. The indirect appeal through liberty is still going on, for the American belief that every freeman can do what he likes, where and when he pleases, as long as he does not infringe the moral law as expressed in the usual criminal code, dies very hard. But it is dying, and the courts, when invoked to-day under the due-process clause, are doing little more than easing the patient's later days.

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[48] Lochner *v.* New York, *supra.*

[49] Frank *v.* Mangum, 237 U. S. 309, 345 (1915).

[50] McFarland *v.* American, etc. Co., 241 U. S. 79 (1916).